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IN THE

Supreme Court of the United States

October Term, 1959

No. 803

ABE GIDDINS and INTERSTATE DRESS CARRIERS, INC.,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
The Opinion Below	1
Grounds of Jurisdiction	2
Summary Statement of the Case	2
Questions Presented	4
Reasons for Granting the Writ	6
Conclusion	19
Appendix	20

CASES

Fallen v. United States, 5th Cir., 220 F. 2d 946	13
Hammer v. United States, 271 U. S. 620	16
Michelson v. United States, 335 U. S. 469	4, 7, 8, 12
People v. Evans, 40 N. Y. 1	16
People v. Smith, 162 N. Y. 520	15
Roberson v. United States, 5th Cir., 237 F. 2d 536	8
State v. Keul, 233 Iowa 852, 5 N. W. 2d 849	10
United States v. Chiarella, 2d Cir., 184 F. 2d 903	10
United States v. Michelson, 2 Cir., 165 F. 2d 732	7

STATUTES

Motor Carrier Act of 1935, 49 Stat. 543, as amended, 54 Stat. 919, 49 U. S. C., §301 et seq.	17
United States Code:	
Title 18 §232	17
Title 18 §1621	17
Title 18 §1622	1, 6, 16
Title 28 §1254(1)	2
Title 49 §322	18
Title 49 §322(a) and (c)	6

MISCELLANEOUS

PAGE

Cong. Record, p. 5650, 74th Cong., 1st Sess., April 15, 1935 18

Notes of the Revisers to Section 1621, Title 18, U. S. C. 17

Report of Committee on Revision of the Laws dated February 15, 1945, 79th Cong., 1st Sess., H. R. Nos. 152, 304 17

Revisers Note to Section 1622 18

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Abe Giddins and Interstate Dress Carriers, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming a judgment convicting petitioners of unlawfully suborning a witness to testify falsely before the Interstate Commerce Commission in violation of Title 18 U. S. C. §1622.

The Opinion Below

The opinion of the Court of Appeals is reported in 273 F. 2d 843. A copy thereof is set forth as an Appendix hereto.

Grounds of Jurisdiction

The judgment of the Court of Appeals was entered on January 18, 1960. Timely application for rehearing or for a stay of the mandate and continuance on bail was made on February 1, 1960. On February 19, 1960, the Court of Appeals denied rehearing, but granted the motion to stay the mandate and continued petitioner Giddins on bail pending the filing and determination of the petition herein.

The jurisdiction of this Court is invoked pursuant to Title 28 U. S. C. §1254(1).

Summary Statement of the Case

In June 1953, an examiner of the Interstate Commerce Commission held a hearing on the application of petitioner Interstate Dress Carriers, Inc. (hereafter called Interstate) to extend its garment trucking route between New York and certain southern states (R. 10a-11a). Eleven manufacturers and contractors appeared as witnesses in support of the application (R. 14a-15a). Their testimony, however, failed to show present or future necessity for extending Interstate's transportation service, and hence the application was denied (R. 17a-19a).

About five years after the hearing, petitioners were indicted on a charge of suborning one of the witnesses, Edward Kornfeld, to testify falsely at the hearing held on June 12, 1953. It was claimed that petitioner Giddins, president of Interstate, induced Kornfeld to testify falsely that he was the production and shipping manager of Gerson & Gerson, Inc. and that the company would utilize Interstate's transportation service if the application were granted (R.

4a-6a). In fact, Kornfeld was not employed by the Gerson company, but was in charge of production and shipping for Petite Frocks, Inc., which, it was claimed, had no need for the transportation service involved in petitioners' application (R. 51a, 60a, 61a).

To support the charge of subornation, the Government relied solely upon Kornfeld's uncorroborated assertion that he testified falsely before the examiner because petitioner Giddins asked him to say that he was the production and shipping manager for the Gerson company (R. 56a, 60a).

On behalf of the defense, petitioner Giddins admitted that he had asked Kornfeld to be a witness for Interstate, but denied that he had ever suggested or had any knowledge that Kornfeld would give any false testimony (R. 102a-118a), insisting that it was his understanding that Kornfeld would testify as production manager for Petite Frocks (R. 112a).

Five character witnesses testified that petitioner Giddins' reputation for truthfulness and honesty was beyond reproach (R. 97a, 100a-101a, 156a-160a).

The question of guilt or innocence turned, therefore, on the choice the jury would make between: (a) the uncorroborated word of Kornfeld, an admitted perjurer; and (b) the testimony of petitioner Giddins who had never been convicted of crime and whose denial of any wrongdoing was supported by an excellent reputation for truthfulness and honesty, attested to by uncontradicted character witnesses.

Questions Presented

1. When a character witness testifies that a defendant has an excellent reputation for truthfulness and honesty, does this Court's decision in *Michelson* v. *United States*, 335 U. S. 469, give the trial judge discretion to permit the following cross-examination without ascertaining whether there is a basis for the prosecutor's imputation of partnership in dope peddling and racketeering:

> "Q. Have you heard that the defendant Abe Giddins, the individual as to whom you have just testified, is the business partner of Harry Strasser, a convicted dope peddler, and the former business partner of the late Albert Anastasia" (R. 101)?*

2. Under this Court's decision in the *Michelson* case (*supra*), may a trial judge permit the unmistakable imputation of criminal association, inherent in the above quoted "have-you-heard" question, to be presented to a jury, despite the judge's knowledge, obtained in a private conference in chambers, that the prosecutor's question was based on a confidential FBI report allegedly indicating that the defendant was a former business partner of the named individuals "in a dress-contracting establishment" (R. 99a)?

3. If the wide discretion permitted in the *Michelson* case (*supra*) be stretched to encompass the kind of cross-examination quoted above, may it be further stretched to include a case where the trial judge:

---

* For many years "the late Albert Anastasia" was one of the most notorious gangsters and racketeers in the country. His recent assassination in a Manhattan barber shop received nationwide notoriety.

(a) failed to instruct the jury while overruling an objection to the prosecutor's question, that the alleged nefarious partnership was not to be considered as an actual fact, or to indicate the limited purpose for which such cross-examination may be considered, stating merely:

> "The Court: As I indicated, and the reason for my indication in chambers, I will allow it" (R. 101a);*

(b) informed defense counsel in denying a motion for a mistrial:

> "The Court: You have an exception. That is the best we can do under our system" (R. 120a);

(c) and four days later, in the charge to the jury, called attention to the fact that "there was no evidence" of the alleged partnership, that the character witness said he never heard of it (R. 214a), but preceded these remarks with this observation:

> "It may be that those with whom he (the defendant) had come in contact previously had been misled and that he did not reveal to them his true character" (R. 213a),

to which instruction an exception was taken (R. 216a)?

4. Was it "harmless error" for the prosecutor:

(a) to represent in the presence of the jury, without any basis whatever, that he was "prepared to prove" that petitioners committed a prior similar act of subornation of perjury (R. 144a-145a);

---

* The reason given in chambers was that since the defendant intended to testify in his own behalf, such cross-examination would become "part of the cross-examination in any event" (R. 99a-100a).

(b) to induce the court to rely on the representation and to receive in evidence an equivocal exhibit in expectation of further evidence (R. 149a-150a, 162a);

(c) to rest the Government's case without offering a single word of testimony to support this charge;

(d) and thereby compel petitioners to litigate a false issue and present substantial evidence (R. 168a-199a), which ultimately caused the court to instruct the jury to disregard everything "relative to that issue" (R. 214a)?

5. Is the uncorroborated word of the self-confessed perjurer sufficient in law to support the charge that petitioners suborned him to commit the perjury?

6. Upon conviction for subornation of perjury in a hearing before the Interstate Commerce Commission on an application for a certificate of convenience and necessity, may the court impose the penalty provided in the general subornation of perjury statute (Title 18, U. S. C. §1622) or is the court controlled by the penalty provided in Part II of the Interstate Commerce Act (Title 49, U. S. C. §322(a) and (c)?

Reasons for Granting the Writ

1.

In holding that the cross-examination of the character witness and the rulings of the trial judge in connection therewith do not constitute reversible error, the court below has decided questions of importance in the administration of criminal justice in a manner inconsistent with the decisions of this Court and contrary to the interests of justice.

The opinion of the court below, written by Judge Clark, states that consideration of the type of cross-examination conducted by the prosecutor "led Judge Frank in *United States* v. *Michelson*, 2 Cir., 165 F. 2d 732, to recommend that the Supreme Court consider limiting the permissible scope of cross-examination of character witnesses." The opinion also suggests that this Court's decision on certiorari, *Michelson* v. *United States*, 335 U. S. 469, rejecting the recommendation and investing the trial court with "wide discretion" to control the cross-examination, required the court below to sanction what happened in the case at bar.

The fact, however, is that this Court's decision in *Michelson* provided minimal standards of fairness to prevent the kind of cross-examination that was permitted here. Justice Jackson, writing for a majority of this Court, made it clear that trial courts had a duty to be on the alert to see that the "have-you-heard" cross-examination of a character witness was not abused, and that it was incumbent on prosecutors to be scrupulous in not stepping out of bounds on this sort of cross-examination. He emphasized that:

> "Wide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse" (335 U. S. at p. 480).

Justice Jackson further indicated the need for essential safeguards and made repeated note of the fact that in that case the trial judge "on three occasions warned the jury, in terms that are not criticized, of the limited purpose for which this evidence was received", stating at page 481:

> "The trial judge was scrupulous to so guard it in the case before us. He took pains to ascertain, out

> of the presence of the jury, that the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to defendant's reputation. He satisfied himself that counsel was not merely taking a random shot at a reputation imprudently exposed *or asking a groundless question to waft an unwarranted innuendo into the jury box.*" (Emphasis added).

It is also not without significance that Mr. Justice Rutledge, with whom Mr. Justice Murphy joined, filed a strong dissenting opinion, and while Mr. Justice Frankfurter concurred in the Court's opinion, he did so "Despite the fact that my feelings run in the general direction of the views expressed by Mr. Justice Rutledge in his dissent" (335 U. S. at p. 487).

This Court's decision in *Michelson* is, therefore, to be regarded, in the words of the Court of Appeals for the Fifth Circuit, as marking "the extreme limits of permissible cross-examination." *Roberson* v. *United States,* 5th Cir., 237 F. 2d 536, 540.

Here, however, neither court nor prosecutor gave any heed to their responsibilities. The court made no attempt to ascertain while in chambers whether the unmistakable imputation of partnership in the nefarious activities of a convicted dope peddler and of a notorious gangster and racketeer were based on either rumor or fact. The court was content to rely on the prosecutor's unsupported assertion that he believed he could prove it (R. 98a-99a). When defense counsel insisted that the prosecutor "ought to satisfy the court that there is more to it than just a belief on his part", the prosecutor revealed that he relied on a

confidential FBI report allegedly indicating that petitioner Giddins was a former business partner of Strasser and Anastasia in a *"dress-contracting establishment"* (R. 99a).

But "in a dress-contracting establishment" was omitted by the prosecutor when he subsequently framed his "have-you-heard" question in the presence of the jury (R. 101a), for the obvious reason that being a business partner in a dress-contracting establishment with a person named Strasser and a person named Anastasia would not be incompatible with petitioner's excellent reputation for truthfulness and honesty.

It was only by omitting the key words, and by adding that Strasser was "a convicted dope peddler" and that Anastasia was "the late Albert Anastasia", that the prosecutor succeeded in conveying to the jury the suggestion that petitioner Giddins was a partner in dope peddling and racketeering. For this suggestion the prosecutor had no basis whatever, either in rumor or in fact.

The vice of the prosecutor's baseless imputation of partnership in crime apparently gave the court below some concern. Judge Clark's opinion states:

> "While the wording of the question taken by itself might suggest an inference that the reference was to a partnership in illegal endeavors, this was dispelled by the tenor of related questions and answers on direct and cross-examination of the defendant."

The difficulty with this clairvoyant assumption is that the prosecutor's question, if stripped of the inference of partnership in criminality or illegal endeavors, would have no bearing on the issue of petitioner's reputation for truthfulness and honesty. It would then be inadmissible as a

matter of law. Partnership in a *legitimate* dress-contracting establishment could not affect petitioner's reputation.

Judge Clark's ruling, therefore, necessarily means that an accused's good reputation for truthfulness and honesty may be impeached by relying on a confidential report that he was a business partner in a legitimate enterprise with other partners who were not to be trusted.

To permit this ruling to gain a foothold in the administration of criminal justice in our Federal courts would be to sanction the odious doctrine of guilt by association. As stated by Chief Judge Learned Hand in *United States* v. *Chiarella*, 2d Cir., 184 F. 2d 903, 911:

> "The excuse offered by the prosecution was that it was proper to show what kind of people the accused 'associates with', because he had called witnesses to prove his reputation for honesty. We know of no such doctrine, and no authorities are cited in its support; the question was improper and the prosecution should have known that it was."

A case directly in point is *State* v. *Keul*, 233 Iowa 852, 5 N. W. 2d 849, where the Supreme Court of Iowa held:

> "Rumors that certain named persons have committed assaults do not make their associates in lawful organizations persons of bad reputation. The test suggested by the cross-examination would destroy many good reputations. * * * Obviously, such inquiries should be limited to rumors which affect the reputation of the defendant. Inquiries about rumored acts which affect the reputation of third parties only are not a proper test of the extent of the information of the witness concerning the subject of his testimony or of the credibility of the witness in other respects."

The opinion of the court below also attempts to support its ruling with the statement that:

> "No cautionary instruction was requested at the time the question was posed, perhaps due to counsel's desire to avoid further emphasis on the matter. In the absence of such request, the instruction at the end of the trial sufficed."

The fact, however, is that counsel repeatedly objected to the prosecutor's question (R. 98a-101a), moved for a mistrial (R. 102a), and told the trial judge: "I do not know how to protect myself." In response to this complaint counsel was met with the following reply:

> "The Court: You have an exception. *That is the best we can do under our system*" (R. 120a; Emphasis added).

But this was not all. Four days later, in the charge to the jury, the court in speaking of character testimony said:

> "It may be that those with whom he (defendant Giddins) had come in contact previously had been misled and that he did not reveal to them his true character" (R. 213),

to which an exception was taken (R. 216a).

The court below quotes the charge immediately following the above quoted sentence, to the effect that "there was no evidence in this case that the defendant Giddins was a partner of either of these two men." But that observation did not modify, either expressly or impliedly, the earlier statement. There is a vast difference between an absence of evidence and an invitation to speculate that the defen-

dant may have misled the people he met to conceal his true character.

Viewing the facts in their totality, the decision of the court below breaks the limitations set by this Court in the *Michelson* case. The minimal safeguards therein provided have not been observed here. Instead, a dangerous precedent has been created which calls for this Court's supervisory control.

2.

As a witness in his own behalf, petitioner Giddins denied that he ever asked or induced Kornfeld to testify falsely (R. 111a-113a, 118a). To impeach this testimony the prosecutor represented in the presence of the jury that he was "prepared to prove" that Giddins or someone else acting on behalf of the corporation committed "a prior similar act" of suborning another witness, one Max Sawitz, to commit perjury at the hearing before the examiner (R. 144a-148a).

It cannot be too strongly emphasized that this highly prejudicial accusation was made without having the slightest basis to support it. Here again, the prosecutor resorted to the same unfair methods that he used on cross-examination of the character witness.

In the absence of the jury, the court ruled that "the prosecution is always allowed on the question of intent to show similar acts" (R. 145a-146a). Defense counsel urged the court not to accept the prosecutor's unsupported representation. He insisted that the prosecutor was guessing and had no proof, and that as a matter of law evidence of

similar crimes to prove intent was admissible only "where the intent does not flow from the act itself" (R. 146a-148a).*

The court, however, took the position that no offer of proof was necessary (R. 146a), that "a lawyer should be able to prove what he intends to prove" (R. 147a), and advised the prosecutor:

> "The Court: I am telling you it will boomerang so that it will bleed if it isn't true" (R. 148a).

Thereupon, the proceedings were resumed in the presence of the jury, where the court, relying on the prosecutor's representation, received in evidence a copy of a paper filed in the Corporation Commission's Office of Richmond, Virginia, in November, 1953, purporting to indicate that in June, 1953, Giddins, and not Sawitz, was the president of Colonial Fashions (Govt's Exh. 9, R. 149a-150a, 196a-197a).

Thereafter, the prosecutor rested the Government's case without offering a single word of testimony to support his charge of another subornation of perjury.

In these circumstances, defense counsel moved to strike Government's Exhibit 9 and requested appropriate instructions to the jury. The court, however, denied the motion to strike, stating in the absence of the jury:

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* Appellants raised no issue on the element of intent. The defense consisted of a flat denial that they asked or induced Kornfeld to commit perjury. In these circumstances, criminal intent would necessarily flow from a rejection of the defense and would need no additional support by evidence of an independent similar crime. *Fallen v. United States*, 5th Cir., 220 F. 2d 946, 948-949: "Proof of the commission of the act carried with it the evident implication of a criminal intent. In such instances, evidence of the perpetration of other like offenses is not needed to establish criminal motive or intent and is not admissible for such purpose."

> "The Court: I am going to tell the jury it didn't prove it (subornation of perjury). I will keep the exhibit in the record" (R. 161a).

The trouble with the court's ruling was that by refusing to strike Exhibit 9 petitioners were confronted with a Hobson's choice. If they failed to show that it was incorrect, the jury might infer that the prosecutor had some basis for his accusation that they committed a similar crime. If, on the other hand, they undertook to supply the evidence showing Exhibit 9 to be incorrect, they faced the problem of litigating a collateral issue created by a baseless accusation. In this dilemma, defense counsel, being unable to persuade the court to strike Exhibit 9, moved:

> "Mr. Gelb: As long as Exhibit 9 is in evidence, I ask you to reopen the case" (R. 164a).

Thereafter, a substantial part of the trial was devoted to the presentation of testimony and documentary proof through the attorney for Colonial Fashions, showing that in June, 1953, Max Sawitz was in fact president of that company (R. 168a-186a, Defts' Exh. C-J).

On cross-examination of the attorney the prosecutor continued with unfounded "Isn't-it-in-fact-true" questions (R. 187a, 193a), suggested that the attorney may be "lying" (R. 192a), and insinuated that Colonial Fashions was not operating until September, 1953 (R. 187a).

Here again, the opinion of the court below assumes that whatever harm may have been caused was "dispelled" by reason of the evidence produced by the defense and by reason of the charge to the jury.

It is respectfully urged that the wrong and the harm was that petitioners were forced to litigate a false and highly prejudicial issue. They could not permit the prosecutor's baseless accusation to remain uncontradicted. But this does not warrant the conclusion that thereby they "dispelled" the prejudice. In view of the fact that the real issue in the case turned upon the jury's choice between the uncorroborated word of an admitted perjurer and the word of the petitioner Giddins who had never been convicted of crime, it seems to us that if any assumption is to be made it must be one of irretrievable prejudice rather than of "harmless" error.

The instructions to the jury could not erase the prejudice created by the prosecutor's unfounded accusation; nor could they blot out the harm caused by the necessity to litigate a false issue. As stated by the Court of Appeals of New York in *People* v. *Smith*, 162 N. Y. 520, 530:

> "If the district attorney had the right to make the proof he proposed he did not make it, and thus may have prejudiced the defendant by a charge he could not or did not intend to support; if the district attorney had no right to make the proof then the charge, although no more harmful to the defendant, was a more reprehensible invasion of his rights."

3.

As heretofore noted, the Government's case rests solely upon Kornfeld's uncorroborated assertion that his wilfully false testimony before the examiner in June, 1953, was given at the behest of petitioner Giddins. There is not a word of independent testimony to lend support to his accusation.

It is submitted that the uncorroborated testimony of an admitted perjurer should be held, as a matter of law, to be insufficient to establish that he was induced by the accused to commit the perjury.

The question was expressly left open by this Court in *Hammer* v. *United States*, 271 U. S. 620, 629. Research fails to disclose any subsequent decision by this Court deciding the question. The courts of the State of New York refuse to permit such testimony to be the basis of a conviction. *People* v. *Evans*, 40 N. Y. 1.

The court below held that it "could see no reason to depart from the rule that the element of subornation, as distinguished from the element of perjury, is not subject to the requirement of corroboration."

It seems to us to be an anomaly to hold that the perjurer's uncorroborated testimony is not sufficient to establish his own guilt, and yet sufficient to establish the guilt of another.

The perjurer is not in the same position as the usual accomplice. Perjury is different. It destroys all foundation for belief. It vitiates everything it touches. Absent some corroborative evidence to create faith in the perjurer's accusation, a jury is placed in the stultifying position of finding that he is a wilful liar but a truthful accuser.

4.

Petitioner Giddins was sentenced to imprisonment for a year and a day, and petitioner Interstate was fined $2,000. These sentences were imposed under the general subornation of perjury statute. Title 18 U. S. C. §1622.

Petitioners urge that, upon conviction for subornation of perjury arising out of a hearing before the Interstate Commerce Commission on an application for a certificate of convenience and necessity, the proper punishment is that provided in Part II of the Interstate Commerce Act, commonly known as the Motor Carrier Act of 1935, 49 Stat. 543, as amended, 54 Stat. 919, 49 U. S. C., §301 *et seq.* Under this Act the maximum punishment for the offense charged is a fine of $100 under Section 322(a) or $500 under Section 322(c).

These penalties apply to the instant case by reason of the amendment in 1948 to the general perjury statute (Section 1621, Title 18, U. S. C.) which excludes the punishment there provided in cases where a different punishment is "otherwise expressly provided by law". By this amendment, Congress intended to prevent conflict with the perjury provisions in other titles, of which there are more than 25 in the Code, where different punishments are provided. See, Notes of the Revisers to Section 1621, Title 18, U. S. C.; Report of Committee on Revision of the Laws dated February 15, 1945, 79th Cong., 1st Sess., H. R. Nos. 152, 304.

Prior to the revision of the Criminal Code in 1948, the punishment for subornation was always incorporated by reference to the perjury section. Thus, former Section 232 of Title 18 provided that: "Whoever shall procure another to commit any perjury is guilty of subornation of perjury, *and punishable as in Section 231 of this title prescribed.*"

The only change made in the 1948 revision of the subornation section was to expressly provide for the same

punishment as perjury instead of doing so by reference. As stated by the Revisers Note to Section 1622:

> "The punishment prescribed in section 1621 of this title was substituted for the reference thereto.
>
> "Minor change was made in phraseology. 80th Congress House Report No. 304."

It is thus evident that there was no intent to exclude the punishment "otherwise expressly provided" in the various perjury provisions under other titles of the Code.

The court below held that it could "find no Congressional intent that the general prohibitions of 49 U. S. C. §322, dealing as they do with motor carrier regulation by the ICC and making no reference to perjury or subornation thereof, should supplant the specific proscription of perjury in 18 U. S. C. §1621."

There is, however, serious doubt whether the court below is correct. See, Senator Wheeler's report to the Senate of the hearings held before the Interstate Commerce Committee. With respect to Section 222 of the Motor Carrier Act (Section 322 of Title 49, U. S. C.) he said:

> "Section 222, page 60. Unlawful operation. This section provides penalties, in the way of fines only, for violations of the Act or the orders of the Commission and authorizes the issuance of injunctions or other judicial processes to enforce obedience." (Cong. Record, p. 5650, 74th Cong., 1st Sess., April 15, 1935).

And Commissioner Eastman, appearing before a subcommittee of the Interstate and Foreign Commerce Committee of the House of Representatives in May, 1938, on a

proposal to amend the Motor Carrier Act to strengthen enforcement, said:

> "• • • the law provides jail sentences for violation of Part I of the Act (dealing with railroads); but there are no jail sentences provided in the case of Part II (dealing with motor carriers)."

CONCLUSION

For the foregoing reasons we respectfully submit that a writ of certiorari be granted.

Respectfully submitted,

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March 18, 1960

APPENDIX

Opinion of United States Court of Appeals

UNITED STATES DISTRICT COURT

FOR THE SECOND CIRCUIT

No. 146—October Term, 1959.

(Argued December 3, 1959 Decided January 18, 1960.)

Docket No. 25633

UNITED STATES OF AMERICA,

Appellee,

—v.—

ABE GIDDENS and INTERSTATE DRESS CARRIERS, INC.,

Defendants-Appellants.

Before:

CLARK, WATERMAN and MOORE,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Thomas F. Murphy, *Judge.*

Abe Giddins and Interstate Dress Carriers, Inc., appeal from their convictions of unlawfully suborning a witness to

testify falsely under oath before the Interstate Commerce Commission in violation of 18 U. S. C. §1622. Affirmed.

SOLOMON A. KLEIN, Brooklyn, N. Y. (Louis Bender, New York City, on the brief), *for defendants-appellants.*

DONALD H. SHAW, Asst. U. S. Atty., S. D. N. Y., New York City (S. Hazard Gillespie, Jr., U. S. Atty., and George I. Gordon and David Klingsberg, Asst. U. S. Attys., New York City, on the brief), *for appellee.*

CLARK, *Circuit Judge*:

These are appeals by Interstate Dress Carriers, Inc., and its president, Abe Giddins, from convictions after trial by jury of subornation of perjury in violation of 18 U. S. C. §1622. The perjury was committed by Edward Kornfeld at a hearing conducted by the Interstate Commerce Commission on the corporation's application to extend its trucking operations between New York and certain southern states. Kornfeld testified that he was the production and shipping manager of Gerson & Gerson, Inc., that the company had a sewing factory in Virginia, and that it would utilize Interstate's transportation services if the certificate were granted. In fact, Kornfeld had no connection with Gerson & Gerson, but was associated with Petite Frocks, Inc., which company had no need for the transportation services involved. Kornfeld had no interest

in Interstate, but he was related to Giddins through marriage and the two were frequent social companions.

The only direct testimony as to subornation was that of Kornfeld. Giddins admitted that he had requested Kornfeld to testify, but denied that he had induced or had known of the false statements. The resolution of this conflict depended upon an assessment of credibility—a matter clearly within the province of the jury. It is unnecessary to decide whether Kornfeld's testimony was corroborated, since we see no reason to depart from the rule that the element of subornation, as distinguished from the element of perjury, is not subject to the requirement of corroboration. *Cohen* v. *United States*, 2 Cir., 27 F. 2d 713; *Doan* v. *United States*, 9 Cir., 202 F. 2d 674. No question is raised as to the sufficiency of the quantum of proof on the element of perjury.

The principal assignments of error relate to questions posed by the government on the cross-examination of defendants' witnesses. The first character witness, Justice DiGiovanna of the New York Supreme Court, testified that he had known Giddins since 1940 and that the defendant had an excellent reputation in the community for truthfulness and honesty. On cross-examination the following question was allowed over vigorous objection:

> "Have you heard that the defendant Abe Giddins, the individual as to whom you have just testified, is the business partner of Harry Strasser, a convicted dope peddler, and the former business partner of the late Albert Anastasia?"

The response was negative.

Inquiry directed to a character witness' knowledge of disparaging rumors concerning an accused is almost universally permitted. 3 Wigmore on Evidence §988 (3d Ed. 1940). Such questions are relevant to test the familiarity of the witness with the reputation in question. Further, the defendant by voluntarily adducing evidence of his good reputation is foreclosed from objecting to evidence suggestive of the contrary. The practice has been cogently criticized, however, on the ground of the jury's inability to limit its consideration of such evidence to the issue of reputation. *Ibid.* This problem is aggravated where, as here, the answer is negative, and thus the inquiry is without probative significance unless others testify to the existence of such rumor or unless the witness' demeanor suggests that his denial is fabricated. But the assumption that a jury, even though instructed as to the immateriality of the exchange, will properly ignore it is doubtless based on unreality.

This consideration led Judge Frank in *United States* v. *Michelson*, 2 Cir., 165 F. 2d 732, to recommend that the Supreme Court consider limiting the permissible scope of cross-examination of character witnesses. On certiorari the Court in *Michelson* v. *United States*, 335 U. S. 469, 486, agreed "that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other." But it was recognized that "[b]oth propriety and abuse of hearsay reputation testimony, on both sides, depend on numerous and subtle considerations difficult to detect or appraise from a cold record." *Id.* at 480. Thus the best practical solu-

tion was to be found in investing the trial court with wide discretion to control cross-examination. These rulings were to be disturbed by a Court of Appeals only "on clear showing of prejudicial abuse of discretion."

The Court did, however, provide protection from unwarranted innuendoes by requiring the trial judge to ascertain, out of presence of the jury, whether "the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to defendant's reputation." *Id.* at 481. While the irrelevancy of this inquiry into the actual occurrence of the event was recognized, it was considered to be pragmatically justified. Here this procedure was followed by the trial court. Government counsel assured the court that FBI reports had revealed a business partnership of Giddins, Strasser, and Anastasia in a dress-contracting establishment. Counsel also remarked that the relationship had been the subject of comment in a newspaper story. With this showing of good faith by the government the allowance of the question cannot be deemed a prejudicial abuse of discretion. See *United States* v. *Alker*, 3 Cir., 260 F. 2d 135, 149, certiorari denied *Alker* v. *United States*, 359 U. S. 906; *Segal* v. *United States*, 8 Cir., 246 F. 2d 814, 820, certiorari denied 355 U. S. 894. While the wording of the question taken by itself might suggest an inference that the reference was to a partnership in illegal endeavors, this was dispelled by the tenor of related questions and answers on direct and cross-examination of the defendant.

In its charge at the end of the trial the court advised the jury as follows:

> "In this connection the Government was permitted by me to ask one of the witnesses whether he had heard that the defendant was a partner of Anastasia and Strasser. The witness said that he never did. I permitted this because the witness testified concerning the defendant's reputation and we all know that reputation is the sum total of what we hear about people, and that is why the question was relevant. But I must add that there was no evidence in this case that the defendant Abe Giddins was a partner of either of these two men, and certainly the mere asking of the question doesn't prove that he was.
>
> "In fact, I charge you specifically that there was no evidence in the case connecting the defendant Abe Giddins with either of these two men in any partnership relationship whatsoever."

This instruction was a proper statement of the law. No cautionary instruction was requested at the time the question was posed, perhaps due to counsel's desire to avoid further emphasis on the matter. In the absence of such request, the instruction at the end of the trial sufficed. *See Malatkofski* v. *United States*, 1 Cir., 179 F. 2d 905, 914.

Objection is also raised to the government's representation on cross-examination of Giddins that it was prepared to prove that he or someone else on the part of Interstate had committed a prior similar act of suborning another witness, Max Sawitz. Sawitz had testified at the ICC hearing in June 1953 that he was President of Colonial Fashions, Inc. When Giddins denied that this testimony was false, the government introduced a copy of a report by Colonial to the Virginia Corporation Commission which indicated that Giddins was its president from November

1952 to November 1953. The admission and refusal to strike this exhibit is objected to on the ground that it constituted impeachment on a collateral matter.

The defense was permitted, however, to reopen its case and demonstrate via corporate minutes, the corporate lease, payroll checks, and promissory notes that the report was erroneous, Giddins having been elected president of Colonial upon the resignation of Sawitz in September 1953. Any remaining doubts in the jury's mind would have been dispelled by the following instruction: "When the defendant Giddins was on the stand an issue developed on cross-examination as to whether or not Sawitz testified truthfully or falsely before the ICC examiner when he testified that he was president of Colonial Dress Company. The Government was permitted to go into this collateral issue on its representation that it intended to prove that the defendant Giddins suborned Sawitz's testimony and that it was false. The Government utterly failed in this connection and offered no testimony or no proof that the defendant Giddins had anything to do with Sawitz's testimony, or that he knew that he lied, if in fact he did. All of the testimony relative to that issue should be disregarded by you, since the Government completely failed in its intended proof." Thus the error, if any, in the pursuance of this inquiry can only be deemed harmless. Fed. R. Crim. P. 52; *cf. United States* v. *Novick*, 2 Cir., 124 F. 2d 107, 109, certiorari denied *Novick* v. *United States*, 315 U. S. 813.

The remaining issue involves defendants' contention that sentence should have been imposed under §222(a) or (c) of the Motor Carrier Act of 1935, 49 U. S. C. §322(a, c),

rather than under 18 U. S. C. §1622. Giddins was sentenced to imprisonment for a year and a day, and Interstate was fined $2,000. The maximum penalty under 49 U. S. C. §322(a) at that time was a fine of $100, and under 49 U. S. C. §322(c) a fine of $500.[1]

18 U. S. C. §1622 provides in unambiguous language:

> "Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both."

The assertion that this provision is inapplicable is grounded on the fact that the maximum punishment for perjury under 18 U. S. C. §1621 is a fine of $2,000 and five years' imprisonment, "except as otherwise expressly provided by law." It is argued that perjury and subornation are substantially the same offense, and thus the savings clause of 18 U. S. C. §1621 should be read into §1622. *Cf. Epstein* v. *United States*, 7 Cir., 196 F. 354. Prior to the 1948 revision of the Criminal Code, the punishment for subornation was prescribed to be that imposed for perjury. The Reviser's Note to 18 U. S. C. §1622 merely states that "[t]he punishment prescribed in Section 1621 of this title was substituted for the reference thereto."

But it is unnecessary to decide this point, since we find no Congressional intent that the general prohibitions of

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[1] By amendment of Aug. 14, 1957, to 49 U. S. C. §322(a) and (c) the penalties under (a) have been increased to $100-500 for a first offense and $200-500 for subsequent offenses, while the penalties under (c) have been increased to $200-500 for a first offense and $250-2,000 for subsequent offenses.

49 U. S. C. §322, dealing as they do with motor carrier regulation by the ICC and making no reference to perjury or subornation thereof, should supplant the specific proscription of perjury in 18 U. S. C. §1621. The prohibition of 49 U. S. C. §322(c) against seeking by any means "to evade or defeat regulation as in this chapter provided" is in marked contrast to the specific reference to perjury found in other sections of the United States Code.[2] Further, in reference to a recent amendment to §322, Congress noted that subsection (a) relates "to violations of motor carrier safety regulations," and subsection (c) "to rebates and unlawful competitive practices." H. R. Rep. No. 877, 85th Cong., 1st Sess., 1957 U. S. Code Cong. & Adm. News 1467-68. We thus conclude that sentencing under 18 U. S. C. §1622 was proper.

Judgment affirmed.

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[2] *E. g.*, 5 U. S. C. §789; 13 U. S. C. §213; 26 U. S. C. §§6065, 7206; 38 U. S. C. §787; 46 U. S. C. §§170(13), 787. See also 16 U. S. C. §371; 22 U. S. C. §703; 46 U. S. C. §22.